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Juvenile Court Reform: The Juvenile Offender after L.B. 620

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Note

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I. INTRODUCTION

Under the common law juvenile and adult offenders were tried in the same courts, receiving similar sentences for similar acts.[1] Society's perception of the problems created by the juvenile offender changed, however, and so did its court system. The first juvenile court in the United States was established in 1899; within a few years, laws relating to juvenile offenders were passed in each of the states.[2] Nebraska's juvenile court dates from 1905.[3]

As with many other juvenile court systems, Nebraska's lacked standards to prevent arbitrary and inflexible treatment of juvenile offenders. Since the state's district and county courts shared concurrent jurisdiction over cases involving juvenile offenders,[4] a juvenile could be prosecuted in either court at the discretion of the county attorney. There were substantial quantitative and qualitative differences between a juvenile proceeding in a county court and an adult proceeding in either county or district court. Court procedures varied from an informal proceeding to a formal criminal trial. Further, sentences meted out by these two judicial systems vary greatly. For example, the harshest sentence a juvenile court can hand down is confinement in a Youth Development Center until the juvenile reaches the age of 20 years.[5] Another difference is the consequences of a finding of guilty in the two proceedings. A county court conviction places a number of civil disabilities on the criminal defendant and he acquires a permanent criminal record; however, a finding of guilty in a juvenile court is not considered a "conviction" and does not carry with it the civil disabilities

1. *See* S. RUBIN, CRIME AND JUVENILE DELINQUENCY: A RATIONAL APPROACH TO PENAL PROBLEMS 94 (2d ed. 1961).
2. Cohill, *The United States Supreme Court and the Juvenile Courts*, 9 DUQUESNE L. REV. 573 (1971).
3. Ch. 59, §§ 2, 3 [1905] Neb. Laws 29th Sess. at 306-07.
4. NEB. REV. STAT. § 43-202 (Reissue 1974).
5. NEB. REV. STAT. § 43-210.02 (Reissue 1974).

attached to a criminal conviction. Also, there are provisions to protect the juvenile's record after a finding of guilty.[6] There existed no mandatory criteria for selecting the court in which a criminal action against a juvenile offender would be brought. This arbitrary system had been unsuccessfully attacked on a number of occasions as violating the juveniles' rights to due process of law.[7] In a very real sense, the juvenile offender was at the mercy of the prosecuting attorney.

The Nebraska Legislature recently examined the problem of broad prosecutorial discretion in handling juvenile offenders. The product of this extensive examination is L.B. 620.[8] One of the bill's primary purposes is "[t]o remove children who are within the provisions of this act from the criminal justice system whenever possible . . . ."[9] The bill's effect has been to limit dramatically the county attorney's discretion when choosing the forum in which to prosecute the juvenile offender.

II. FORMER NEBRASKA STATUTES

Before passage of L.B. 620, county attorneys had complete discretion in choosing the forum in which to prosecute juvenile offenders. Charges could be brought in either juvenile or adult court.[10] A fifteen-year-old boy could be subjected to the same procedure and sentencing requirement as an adult offender who had committed a like crime.

The recent Nebraska Supreme Court case of *State v. Grayer*,[11] illustrates the harsh and often inequitable consequences of the traditional system.[12] Fifteen year old Luigi Grayer received a sentence of life imprisonment—pursuant to a plea bargain—after his conviction for first degree murder during the commission of a robbery. On appeal Grayer alleged four counts of error: (1) that

6. NEB. REV. STAT. § 43-206.03(5) (Reissue 1974).
7. A number of Nebraska Supreme Court cases have addressed this issue. In the most recent, State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974), the court held that a prosecuting attorney's determination that a 14-year-old juvenile who was accused of committing a felony was to be prosecuted as an adult in criminal court, rather than as a juvenile in juvenile court, was not a violation of the juvenile's right to due process of law under either the United States or Nebraska Constitution.
8. Neb. Laws, 83d Leg. 2d Sess., 1974. This bill amended 14 separate statutes. To avoid confusion it has been cited throughout the Note as "L.B. 620".
9. *Id.*
10. NEB. REV. STAT. § 43-202 (Reissue 1974).
11. 191 Neb. 523, 215 N.W.2d 859 (1974).
12. *Id.* at 527-32, 215 N.W.2d at 861-64.

the county attorney's discretionary authority to file charges in either the juvenile or criminal courts violated his right to due process of law guaranteed by the fourteenth amendment to the United States Constitution; (2) that the lack of legislative guidelines for the exercise of such discretion violated Article 2, section 1, of Nebraska's Constitution; (3) that there had been committed an abuse of discretion in failing to investigate his background; and (4) that a defendant under sixteen years of age must be proceeded against in a juvenile court.[13] After considering Grayer's arguments, the Nebraska Supreme Court affirmed the district court judgment.

By this affirmation the supreme court once again upheld the prosecutor's discretionary power to decide in which forum a juvenile will be prosecuted.[14] Justice McCown's vigorous dissent leveled a strong attack on the entire opinion. Stating that "[s]tatutes permitting and sanctioning such arbitrary action in the case of juvenile offenders violate the principles of equal protection, as well as due process of law, under both the federal and state constitutions."[15] Judge McCowan dwelt at length on the problems created by vesting complete discretion in county prosecutors.

It may be noted that the court has repeatedly reaffirmed the fundamental principle of our judicial system that individual rights are to be determined by the law itself, not by its administrators. Judge McCown argued that juveniles' rights should be determined by the same constitutional standards as are applied to adults.[16] He also noted that a statute giving absolute, unregulated and undefined discretion to an administrative officer bestows arbitrary authority which is an unlawful delegation of legislative power in violation of Article 2, section 1 and Article 3, section 1 of the Nebraska Constitution.[17] The presumption that an officer will not act arbitrarily

13. *Id.* at 524, 215 N.W.2d at 860.
14. *See* Fugate v. Ronin, 167 Neb. 70, 91 N.W.2d 240 (1958). In a case involving a 14-year-old girl convicted of a felony the court held:
> A careful study of the [Juvenile Court Act] clearly indicates it is not intended the juvenile court shall have exclusive jurisdiction and control of all juveniles. . . . Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated our laws.

Id. at 75, 91 N.W.2d at 243-44. *See also* Kennedy v. Sigler, 397 F.2d 556 (8th Cir. 1968).
15. 191 Neb. 523, 529-30, 215 N.W.2d 859, 862-63 (1974) (McCown, J., dissenting). *See also* Green, *The Disposition of Juvenile Offenders*, 13 CRIM. L.Q. 348 (1971).
16. *Id.* at 530, 215 N.W.2d at 863. *See also* Rosett, *Discretion, Severity, and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972).
17. *Id.* at 532, 215 N.W.2d at 864. *See also* Furman v. Georgia, 408 U.S. 238 (1972) for a discussion of the use and abuse of prosecutorial discretion.

cannot sustain this delegation of unregulated discretion.[18]

Judge McCown addressed himself primarily to the problem of the lack of criteria governing the waiver of juvenile court jurisdiction by the prosecutor. The United States Supreme Court considered this issue in *Kent v. United States*,[19] in which a sixteen-year-old boy was accused of housebreaking, robbery and rape. The District of Columbia Juvenile Court entered an order waiving its exclusive jurisdiction and authorized Kent to be criminally prosecuted in the District Court for the District of Columbia. Although the order stated that it was based on "full investigation," the court failed to grant or rule on motions by Kent's attorney that a hearing be held to consider whether the juvenile court should waive or retain jurisdiction over the case. Moreover, the order stated no reason for granting the waiver and made no reference to the motions filed by Kent's attorney. Subsequently, Kent was indicted in district court, and found guilty on a number of the counts and was sentenced to 30 to 90 years in prison. The conviction was affirmed by the United States Court of Appeals for the District of Columbia Circuit.[20] On certiorari, the United States Supreme Court reversed and remanded the case to the district court for a hearing de novo on the issue of waiver.

In holding that it is incumbent upon the juvenile court to accompany its waiver order with a statement of reasons or considerations, the Court stated:

> We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or—subject to the statutory delimitation—should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation . . . ." The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide—as in this case—that the child will be taken from the Receiving Home for Children

18. *Id.* at 530-31, 215 N.W.2d at 863.
19. 383 U.S. 541 (1966).
20. Kent v. United States, 343 F.2d 247 (D.C. Cir. 1965).

> and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence instead of treatment for a maximum, in Kent's case, of five years, until he is 21.[21]

The Court's holding in *Kent* appears to mandate the establishment and implementation of specific standards before criminal action is initiated against a juvenile in criminal court. Before L.B. 620 such standards existed in Nebraska's statutory scheme. Thus Judge McCown argued, the majority holding in *Grayer* sanctioned an unconstitutional denial of the benefits of Nebraska's Juvenile Court Act to any juvenile offender.[22]

After reading Nebrask's Juvenile Court Act and the majority opinion in the *Grayer* case one might agree with Judge McCown that before L.B. 620 there were two standards of due process and equal protection applied in Nebraska—one for juveniles and another for adults. This double constitutional standard appears to be inconsistent with the United States Supreme Court's holding in *In re Gault*.[23] In that case the Court held that juvenile offenders were guaranteed (1) adequate and timely notice of the proceedings and charges against them, (2) legal counsel (including free legal counsel if the family could not afford counsel), (3) the privilege against self-incrimination, and (4) the right to confront and cross-examine adverse witnesses. When these guarantees are meted out at the discretion of prosecutors, the probability of harmful discrimination increases. Since the idea behind the establishment of the juvenile court system is to treat youthful offenders relative to their age and experience, it seems inconsistent to allow prosecutors to undermine it at their discretion by proceeding against a juvenile in adult court. The *Grayer* case is a classic example of the problem;[24] had Grayer

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21. 383 U.S. at 552 (1966). The statutes mentioned by the Court are D.C. CODE §§ 11-1551 and 1553 (Supp. IV, 1965).
22. 191 Neb. 523, 532, 215 N.W.2d 859, 864 (1974).
23. 387 U.S. 1 (1967). The Supreme Court has dealt extensively with the problems surrounding the due process rights of juveniles in more recent cases. *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) and De Backer v. Brainard, 396 U.S. 28 (1969).
24. The majority opinion in *Grayer* was based on cases that interpreted *Kent* to be merely a statutory decision. *See* United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972); Cox v. United States, 473 F.2d 334 (4th Cir. 1973). Both cases dealt with similar discretion vested in the Attorney General of the United States under federal statutes. Both cases held "Congress could reasonably vest in Attorney General, rather than in a judge in a judicial proceeding, the responsibility of deciding whether or not to prosecute a juvenile as an adult." The *Bland* case specifically states that such discretion does not violate due process. 472 F.2d at 1335-36.

    The majority in *Grayer* extended this argument to Nebraska's statutory scheme.

been proceeded against in juvenile court, he would not have received life imprisonment. At most he would have been incarcerated in the boys' reformatory until the age of twenty. L.B. 620, by providing mandatory standards for prosecutors, may help solve the problem of double constitutional standards.

III. L.B. 620: LEGISLATIVE HISTORY

One of the most difficult problems faced by judges and attorneys in litigating a case is ascertaining the legislative intent underlying statutes. This task has been facilitated for parties interpreting L.B. 620. In both the committee discussions and the floor debates, all the issues were openly and frankly discussed. Therefore, a brief discussion of L.B. 620's legislative history will flesh out the meaning and purpose of this important legislation.

L.B. 620, presented by Senator Barnett, was the result of the research and recommendations made by members of the Nebraska Committee for Children and Youth who were members of the Juvenile Court Study Committee.[25] According to Senator Barnett, the law's basic purpose is to correct problems stemming from prosecutorial discretion in determining in which court a juvenile offender would be tried. Prior to passage of this law, juveniles were given only one opportunity—and that was before the county attorney—for a determination of the court in which they would be tried.[26]

> The laws of this state permit the prosecuting attorney to determine whether a felon of tender age shall be prosecuted in the juvenile court or in the district court as an ordinary offender. This discretion so vested in the prosecuting attorney is akin to that permitting him to determine whether or not to prosecute, what charge should be made and whether or not to dismiss, apply for immunity, or accept a plea to a lesser offense. All these matters represent necessary and essential decisions of an administrative character which of necessity are determined under varying factual circumstances. To fix reasonable legislative standards for the determination of such matters would be difficult and probably impossible due to the multiplicity of factual circumstances.

191 Neb. at 526, 215 N.W.2d at 861. However, if one reads *Kent* and *Gault* together it is questionable whether the court intended to limit its opinions to narrow statutory interpretation.

25. *Hearings on L.B. 620 Before the Judiciary Comm.*, 83d Neb. Leg. Sess., at 2 (1974).

26. *Hearings, supra* note 25, at 1. *See also* NEB. REV. STAT. §§ 42-202 and 43-208 (Reissue 1974). Some jurisdictions, recognizing the vital importance of the transfer decision, have held the decision directly appealable. *See* State v. Briggs, 245 Ore. 503, 420 P.2d 71 (1966); State v. Yoss, 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967); *In re* Houston, 221 Tenn. 528, 428 S.W.2d 303 (1968). *See also* Note, *Review of Improper Juvenile Transfer Hearings*, 60 VA. L. REV. 818 (1974).

The county attorney's decision was final.[27] There were no mandatory criteria for him to follow in making his determination. In Senator Barnett's words:

> [T]he idea is to give the juvenile a little better break . . . the same break that we give adults in that, what it sets up . . . is for the county attorney [to] still decide the initial court that a juvenile should be tried in. Except, in this bill he has the criteria that he shall follow. . . . Now, in the second part of the bill, the juvenile then has the right to appeal. He can appeal this case to the judge that is to hear it. When he appeals this case the judge will then hear and set down through his criteria . . . if he thinks the county attorney is right, or if the juvenile may be tried in a different court.[28]

Finally, Senator Barnett voiced a concern with subjecting juveniles to the harshness of our penal system. He stated that placing juveniles under the jurisdiction of the juvenile court system increased the possibility of rehabilitation.[29] This theme of concern over flexibility runs throughout the law which tries to remove the juvenile from the jurisdiction of the criminal court system—and, wherever possible place him or her under the control of the juvenile court system.

The law evoked considerable public response during the hearings. Provisions of particular interest were the limits placed on the county attorney's discretion in choosing the forum in which to proceed against juveniles,[30] the law's transfer provisions,[31] rules concerning filing of charges,[32] and the criteria that must be considered by the county attorney before filing charges.[33]

Most of the discussion centered around the criteria that the county attorney must consider before filing charges. One speaker asked whether they could pass the equal protection requirements as outlined in the *Kent* case.[34] To guarantee the juvenile's right

27. *Transcript of Debate on L.B. 620*, 83d Neb. Leg. Sess., at 5771-72 (1974).
28. *Id.* at 5771.
29. *Id.* at 5771-72. *See* Griffiths, *Ideology in Criminal Procedure, or A Third Model of the Criminal Process*, 79 YALE L.J. 359 (1970). The author discusses a number of "model" criminal justice systems. His discussion of the Family Model is particularly relevant in considering our juvenile court system and its uses.
30. *Id.* at 4-5. *See also* L.B. 620 § 4 (1974).
31. *Hearings, supra* note 25, at 5-6. *See also* note 57, *infra.*
32. *Hearings, supra* note 25, at 6-9.
33. *Id.* at 8.
34. *Id.* at 8-9; *see also* Kent, *supra* note 14 for a discussion of the equal protection requirements for the transfer and waiver of jurisdiction in juvenile cases; *see also In re* Gault, 387 U.S. 1 (1967). For the court's analysis of these problems on a state level see People v. Fields, 391 Mich. 206, 216 N.W.2d 51 (1974).

to equal protection, a judge or county attorney should be able to determine from reading the law which court the juvenile must be tried in. As will be discussed below,[35] however, these criteria are amenable to various interpretations; their scope may be broadened or narrowed at the discretion of each judge. Thus, whether the law will in fact withstand a constitutional attack on equal protection grounds is open to question at this time.

At the public hearings, concern was also voiced over the provisions dealing with waivers of jurisdiction[36]—specifically, due process problems in relation to the *Kent* case.[37] One proposal was to proceed against juveniles in criminal court.[38] If found guilty, the defendant could be sentenced under either the juvenile or criminal statutes. However, *Kent* and *In re Gault* suggest that this proposal would create more problems than it would solve.[39] Though undoubtedly more efficient, the juvenile's right to due process might be jeopardized under such a system. Once a juvenile had been convicted in a criminal court, who would have the power to decide which statutes would apply in sentencing him? What factors would be considered in making this decision? What restraints, if any, would there be on the decision maker's use of discretion? Would the juvenile have the right to appeal the decision, and if so, on what ground? All of these are valid and grave constitutional questions. Our judicial system, of course, needs flexibility to provide alternatives in dealing with juvenile offenders. However, the procedures used to implement these alternatives must be based on a firm constitutional foundation.

Finally, there were comments made by those who opposed virtually the entire bill.[40] One particular point of contention was the limitations that would be placed on prosecutors. It was argued that although the law might limit the prosecutor's discretion in choosing the forum, it would still allow the decision to be made by a single individual—the judge. While superficially true, this criticism does not tell the entire story. Prior to the passage of L.B. 620, a juvenile could not appeal the prosecutor's decision concerning the forum. Under the new system, however, the decision is scrutinized by two officials. The prosecutor still makes the initial decision, but the

35. *See* notes 51-55 and accompanying text *infra.*
36. *See* note 57 *infra.*
37. *See* note 34, *supra.*
38. *Hearings, supra* note 25, at 16-21. *See also In re F.R.W.*, 61 Wis. 2d 193, 212 N.W.2d 130 (1973); *In re* Jackson, 46 Mich. App. 764, 208 N.W.2d 526 (1973).
39. *See* Kent v. United States, 383 U.S. 541, 553-61 (1966); *In re* Gault, 387 U.S. 1, 3-34 (1967).
40. *Hearings, supra* note 25, at 21-8.

judge can accept or reject it. Further, though the judge's decision cannot be directly appealed, it is reviewable on appeal after the trial. Finally, it might be noted that the prosecutor and the judge play different roles in our system. Where the prosecutor cannot be neutral because of his role, the judge has a duty to be as objective as possible in exercising his power. It can be argued that, in the interests of justice, it is better to have a neutral decisionmaker rule on vital questions such as jurisdiction and venue.

After lengthy debate on the various provisions of L.B. 620, it was passed in April, 1974. The legislation has dramatically effected the entire scope of our judicial system.

IV. THE JUVENILE OFFENDER AFTER L.B. 620

With the passage of L.B. 620, the pre-adjudication status of the juvenile offender drastically changed. Previously a juvenile was at the mercy of the county attorney's choice of forum, but now there are important guidelines that must be used in making this choice.

Section 1 of the bill amended the section of the Nebraska Juvenile Court Act that defined the classes of juveniles dealt with in the act,[41] substituting new definitions for the categories covered.[42] The section states that the juveniles now covered are those defined in sections 3 and 4 of the bill. Section 3, the most relevant portion of the bill dealing with these classes, emphasizes age, social situation and type of offense with which the juvenile is charged in its classifications. This section uses precise categories and language in defining the limits of each class.[43] The new law changed

41. NEB. REV. STAT. § 43-201 (Reissue 1974).

42. The old classes consisted of (1) dependent children; (2) neglected children; (3) delinquent children; (4) children in need of special supervision. Though the legislative history of this bill is silent as to why these classes were redefined, it is possible that the legislature desired to abolish the former classes due to their stigmatizing effect. For example, consider the stigma of being statutorily classified as a "delinquent" or "neglected" child.

43. The county court in each county except as provided in subdivisions (3) (b) and (3) (c) of this section, shall have exclusive original jurisdiction except in counties which have established a separate juvenile court as to the following:

(1) Any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

(2) Any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian; (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects, is unable, or refuses to provide

section 42-202 by omitting the old labels of (1) dependent children; (2) neglected children; (3) delinquent children; and (4) children in need of special supervision. Though the legislative history gives no reason for this change, it is possible that the legislature desired to abolish the former classes because of their stigmatizing effect. For example, consider the stigma of being statutorily classified as a "delinquent" or a "neglected child."

The specificity in the new definitions may be significant in the law's application. For example, section (2) (d) which covers mentally retarded children who are neglected, even though not rewritten, could have a strong impact on the protection of the rights of mentally retarded juvenile defendants when read in conjunction with those sections which have been changed.

Finally, section 1 adds a new subsection to the statute. It states that parties referred to in the Nebraska Juvenile Court Act are those specified in the amended section 43-202. The term "parties" now includes the juvenile or child as described in section 3 of L.B. 620, parents, guardians and custodians of the child.

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proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; (d) whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the child; or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child;

(3) (a) Any child under the age of sixteen years at the time he has violated any law of the state which would constitute a misdemeanor or traffic infraction if committed by a person eighteen years of age or over or any city or village ordinance amounting to a misdemeanor, or providing as a penalty any fine or jail sentence if committed by a person eighteen years of age or more, except parking violations; (b) concurrent jurisdiction with the district court as to any child under the age of eighteen years at the time he has violated any law of the state constituting a felony; and (c) concurrent jurisdiction with the county or municipal court as to any child sixteen or seventeen years of age at the time he has (i) violated a state law constituting a misdemeanor, (ii) committed a traffic infraction, or (iii) violated any city or village ordinance providing as a penalty a fine or jail sentence, except parking violations;

(4) Any child under the age of eighteen years (a) who, by reason of being wayward or habitually disobedient, is uncontrolled by his parent, guardian, or custodian; (b) who is habitually truant from school or home; or (c) who deports himself so as to injure or endanger seriously the morals or health of himself or others;

(5) The parent, guardian, or custodian who has custody of any such child described in this section; and

(6) Proceedings for termination of parental rights as provided in this act.

NEB. REV. STAT. § 43-202 (Cum. Supp. 1974).

As pointed out above, one of the most perlexing problems confronting judges and attorneys when they attempt to interpret a particular statute, is the search for the legislative intent. Section 43-201.01 makes this task relatively simple. In acknowledging the juvenile courts' responsibility to "preserve the public peace and security," the legislators have expressed five specific purposes

> Acknowledging the responsibility of the juvenile court to act to preserve the public peace and security, this act shall be construed to effectuate the following:
>
> (1) To assure the rights of all children to care and protection and to development of their capacities for a healthy personality, physical well-being and useful citizenship and to protect the public interest;
>
> (2) To provide for the intervention of the juvenile court in the interest of any child who is within the provisions of this act, with due regard to parental rights and capacities and the availability of nonjudicial resources;
>
> (3) To remove children who are within the provisions of this act from the criminal justice system whenever possible and to reduce the possibility of their committing future law violations through the provision of social and rehabilitative services to such children and their families;
>
> (4) To achieve the foregoing purposes in the child's own home whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety and, when temporary separation is necessary, to consider the developmental needs of the individual child in all placements and to assure every reasonable effort possible to reunite the child with his family; and
>
> (5) To provide a simple judicial procedure through which these purposes and goals are accomplished and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.[44]

The legislative intent reflects a concern for the juvenile offender as a social being—not merely as a legal problem. With heavy emphasis on alternatives to the often narrow judicial process, this section provides a more flexibile approach to the solution of the many complex problems surrounding the juvenile offender.

Sections 3 and 4 thus might be called the "heart" of L.B. 620. Section 3 amended section 43-202 relating to state court jurisdiction over juvenile cases. During the debate and committee discussions, there was strong opposition to a number of subsections of section 3—especially subsection 3(a)[45] involving children who are under the age of sixteen at the time a state or municipal law or ordinance is violated which would be a misdemeanor if committed by an adult.

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44. NEB. REV. STAT. § 43-201.01 (Cum. Supp. 1974).
45. *Hearings, supra* note 25, at 21-22.

The opposition pointed out that there are no city ordinances that are misdemeanors if violated, implying that the subsection was unnecessary. Though there may be no municipal ordinances amounting to misdemeanors if violated, those who opposed this language apparently did not consider, or overlooked, the language specifically including any *state* law amounting to a misdemeanor.[46] This is an important distinction because there are state traffic violations that amount to misdemeanors and carry a penalty of imprisonment.[47] These are offenses that are not uncommon to the age group covered by subsection 3(a). If this language had not been included, one purpose of the bill—taking juveniles out of the criminal court system—would have been greatly weakened.

Some of the strongest opposition to the bill surfaced in relation to subsections 3(b) and 3(c).[48] These subsections give county courts concurrent jurisdiction—except in counties with separate juvenile courts—with the district courts over children between the ages of sixteen to eighteen who have committed certain offenses. Those opposing these subsections[49] believed they would undermine the authority of the police to make arrests and thought county attorneys should have complete control over the disposition of these juveniles. The opponents suggested that these subsections be deleted. Had this been done, the bill would have been significantly weakened. It must be remembered that one of the primary purposes of this legislation is to create a more flexible scope of jurisdiction

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46. The subsection reads as follows:
> (3) (a) Any child under the age of sixteen years at the time he has violated any law of the state which would constitute a misdemeanor or traffic infraction if committed by a person eighteen years of age or over or any city or village ordinance amounting to a misdemeanor, or providing as a penalty any fine or jail sentence if committed by a person eighteen years of age or more, except parking violations.

47. *See* NEB. REV. STAT. §§ 39-669.02 (Reissue 1974) (reckless driving—punishable by a fine and/or imprisonment for not less than five days nor more than thirty); 39-669.07 (Reissue 1974) (drunken driving—first offense—punishable by a fine and/or imprisonment for not more than three months.

48. The subsections read as follows:
> (b) concurrent jurisdiction with the district court as to any child under the age of eighteen years at the time he has violated any law of the state constituting a felony; and (c) concurrent jurisdiction with the county or municipal court as to any child sixteen or seventeen years of age at the time he has (i) violated a state law constituting a misdemeanor, (ii) committed a traffic infraction, or (iii) violated any city or village ordinance providing as a penalty a fine or jail sentence, except parking violations.

NEB. REV. STAT. § 43-202(3) (Cum. Supp. 1974).

49. *Hearings, supra* note 25, at 22-7.

within which a juvenile may be prosecuted;[50] the only effective means to accomplish this is through the creation of concurrent jurisdiction.

The most vehement criticism was directed at section 43-202.01.[51] This section was designed to limit the discretionary power of prosecutors to file criminal charges against juvenile offenders in county or district court. It makes it mandatory that the county prosecutor, when deciding whether to file a criminal charge or a juvenile court petition, consider, among other things, the eight criteria in this section:

> (1) The type of treatment such minor would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the minor and the ages and circumstances of any others involved in the offense; (5) the previous history of the minor, including whether he had been convicted of any previous offenses or adjudicated in juvenile court and, if so, whether such offenses were crimes against the person or relating to property, and any other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the child as determined by consideration of his home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for the treatment and rehabilitation of the minor; and (8) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority and, if so, the available alternatives best suited to this purpose.
>
> The county attorney shall attach an affidavit with his complaint or petition, as the case may be, setting forth his decision and that he has considered such criteria.[52]

The county attorney must also attach an affidavit to his complaint (or petition) verifying that he has considered all the criteria in making his decision. Nowhere in the law's legislative history or in its text is there reference to the specific form or requirements this affidavit must meet. It is not clear whether the affidavit must contain the reasoning underlying the county attorney's decision or whether merely swearing that he considered the standards is sufficient. Considering the implications of this latter requirement—if it is one—one can be certain that this question will be litigated in the future.

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50. *Transcript, supra*, note 22, at 5771-72. *See also* Note, *Prosecutorial Discretion and the Decision to Waive Juvenile Court Jurisdiction*, 1973 WASH. U.L.Q. 436.
51. *See* note 49 *supra*.
52. NEB. REV. STAT. § 43-202.01 (Cum. Supp. 1974).

Section 43-202.01 directly reflects the philosophy underlying L.B. 620.[53] These standards will help to ensure a rational basis for a prosecutor's decision as to which court will hear the case. They incorporate flexibility into the court system, allow a wide variety of alternatives to be considered, and emphasize rehabilitation rather than punitive sanctions. One example of the differences may be found in the case of a juvenile misdemeanant who is mildly mentally retarded. Before L.B. 620 his mental condition might have been overlooked by the county attorney in deciding which court would handle the case. Under section 43-202.01(6), however, the county attorney must consider this condition in making his decision. Under various provisions of this bill[54] it is likely that the court would prescribe some form of therapy or treatment rather than punish the individual. This, in turn, would take the juvenile out of the criminal justice system and place him in a situation where his best interests, as well as society's, would be served. This example can be expanded to include juveniles with physical, emotional, or social problems and still not exhaust the possibilities under section 43-202.01. The effect of this approach will be to encourage the administration of justice on an individualized basis.

Though section 43-202.01 has created an atmosphere for injecting more rationality and justice into the juvenile court system, it also may create a number of problems. One of these concerns the broad, and sometimes vague, language used within the statute. For example, the prosecutor must consider the juvenile's "pattern of living"[55] in making his determination. What does this mean? If the juvenile is a member of a family living in dire poverty, must this be considered? What about the son or daughter of "hippie" parents? Who defines the scope of this "pattern"? These are difficult questions, but they must be asked. Another possible problem is equal protection. Will the language of this section be interpreted to treat similarly situated juveniles alike? Will greater weight be placed on one criterion than another? Is a uniform standard of interpretation and implementation for these criteria possible?

53. *See* note 27, *supra.*

54. One can find these provisions in a number of sections of the bill. For example, § 43-202(2)(d) speaks of children who need "special care made necessary by . . . (his) mental condition." Also, § 43-202.01(1) states that the prosecutor must consider "[t]he type of treatment such minor would most likely be amenable to. . . ." Considering these and other provisions, it appears that the court might have power to make such disposition of the juvenile as it deems necessary. This proposition is directly supported by the language of § 29-2204. *See* note 63, *infra.*

55. *See* section 4(6).

Again, these are difficult questions that the courts will have to answer eventually.

Section 43-202.02 is a completely new statute while section 6 of L.B. 620 amends the current statute covering the arraignment of juveniles and waiver of the court's jurisdiction.[56] These sections should be read together because they overlap in terms of subject matter.

Section 43-202.02 provides that, at any time prior to trial or entering a plea, a juvenile sixteen or seventeen years of age at the time he committed the offense may petition the municipal or county court to waive jurisdiction to the juvenile court for further proceedings.[57] In deciding the motion, the court must consider the standards found in 43-202.01. If the court decides to retain jurisdiction, the juvenile may appeal this decision after trial.[58] This allows an accused juvenile a "second chance" at getting into a juvenile court.[59]

As noted, 29-1816 also involves waiver of jurisdiction.[60] The pro-

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56. NEB. REV. STAT. § 29-1816 (Reissue 1964).

57. At any time before trial or entering a plea, a child sixteen or seventeen years of age at the time of the commission of the alleged act charged in municipal court or in county court not sitting as a juvenile court may move the court in which the charge is pending to waive jurisdiction to the juvenile court for further proceedings under Chapter 43, article 2. In deciding the motion the court shall consider, among other matters, the matters required to be considered by the county attorney pursuant to section 4 of this act when determining the type of case to file.

    The court shall set forth findings for the reason for its decision, which shall not be a final order for the purpose of enabling an appeal. If the court determines that the child should be transferred to the juvenile court, the complete file in the court shall be transferred to the juvenile court and the complaint may be used in place of a petition therein. The court making a transfer shall order the minor to be taken forthwith to the juvenile court and designate where the minor shall be kept pending determination by the juvenile court. The juvenile court shall then proceed as provided in Chapter 43, article 2.

    NEB. REV. STAT. § 43-202.01 (Cum. Supp. 1974).

58. *See* note 26 *supra*. It is questionable whether review of the judge's decision after the trial is an adequate remedy. It might be better to amend this section so as to make the judge's decision final for the purpose of an appeal. This would extend to the juvenile the advantage of having the decision reviewed in relation to the provisions of section 4 and would promote judicial economy in terms of re-adjudicating cases.

59. *See* Resteiner, *"Delinquent or Criminal: Problems of Transfers of Jurisdiction,"* JUVENILE JUSTICE, May, 1973, at 2.

60. The accused shall be arraigned by reading to him the indictment or information, unless the reading shall be waived by the accused where the nature of the charge is made known

visions are the same as the old statute[61] except that the section now provides for a motion to have the district court waive its jurisdiction to the county court at the time of the arraignment or at any time not less than fifteen days before trial. Since many county courts sit as juvenile courts, this gives the juvenile another chance to have his case heard before a juvenile court. It also must be noted that the district court's decision is reviewable on appeal. The other significant change in this section is the language stating that the accused may be arraigned by "information" as well as by indictment. Arraignment by information would allow the juvenile to forego the stigma of being indicted. This is important when one considers the future effects of a criminal record.[62]

Section 29-2204(2), dealing with sentencing, may be one of the most important changes made by L.B. 620.[63] The statute now

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to him, and he shall then be asked whether he is guilty or not guilty of the offense charged. If the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he shall be deemed to have waived arraignment and a plea of not gulty shall be deemed to have been made.

At the time of the arraignment or at any time not later than fifteen days before trial, the defendant, if he were less than eighteen years of age at the time of the commitment of the alleged crime, may move the district court to waive jurisdiction in such case to the county court or the separate juvenile court, as the case may be, for further proceedings under Chapter 43, article 2. The court shall schedule a hearing on such motion within fifteen days.

In deciding such motion the court shall consider, among other matters, the matters set forth in section 4 of this act for consideration by the county attorney when determining the type of case to file.

The court shall set forth findings for the reason for its decision, which shall not be a final order for the purpose of enabling an appeal. If the court determines that the child should be transferred to the juvenile court, the complete file in the district court shall be transferred to the juvenile court and the indictment or information may be used in place of a petition therein. The court making a transfer shall order the minor to be taken forthwith to the juvenile court and designate where the minor shall be kept pending determination by the juvenile court. The juvenile court shall then proceed as provided in Chapter 43, article 2.

NEB. REV. STAT. § 29-1816 (Cum. Supp. 1974).

61. NEB. REV. STAT. § 29-1816 (Reissue 1964).

62. *See*, Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20 (1962).

63. (1) Except as provided in subsection (2) of this section, in all cases when any person shall be convicted of any offense by this code declared criminal, and made punishable by imprisonment in the Nebraska Penal and Correctional Complex, the court shall declare in its sentence for what period of time, within the respective periods prescribed by law, such convict shall be imprisoned at hard labor in the Nebraska Penal and

provides that if a juvenile was under eighteen years of age at the time the crime was committed, the court may use its discretion in imposing a sentence. The court, instead of imposing the applicable sentence, may make such disposition of the juvenile as the court deems proper under the circumstances. The standards for making this determination are those set forth in the existing applicable state statutes.[64] Though one might view this as a grant of arbitrary discretionary power, a reading of the entire bill belies this interpretation; section 29-2204(2) merely grants a measure of flexibility to the court. In many cases the statutory sentence may be too harsh and unrealistic relative to the particular defendant. The statute gives the court the flexibility to fit the sentence to the crime, thus striking a balance between guilt and punishment.

The courts may require section 29-2204(2) to be implemented using the standards set out in section 43-202.01. In this way the courts could free themselves from the constraints imposed by the inflexibility of the old statutes which did not consider social, economic and socio-psychological elements. Few alternatives were available in terms of sentencing. By using the standards outlined in section 43-202.01, the courts can tailor the judicial process to the individual case.

It should be noted that this proposal is open to an equal protection attack. It may be argued that sections 43-202.01 and 29-2204(2) provide for inherently unequal administration of justice. This criticism, however, might be countered by pointing out that justice is never "equal" in the sense that the same penalty given to every defendant committing the same crime provides an "equal" sanction for the offense. Rather, "equal justice" is that justice dispensed according to all the facts and circumstances unique to each defendant in each particular case. Therefore, if the intent of the legislature—as expressed in section 43-201.01—is to be fulfilled, the courts

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Correctional Complex; and shall moreover determine and declare in its sentence whether any such convict shall be kept in solitary confinement in the cells of the Nebraska Penal and Correctional Complex, without labor, and if so, for what period of time.

(2) Whenever the defendant was under eighteen years of age at the time he committed the crime for which he was convicted, the court may in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the provisions of Chapter 43, article 2, as to persons adjudicated in the juvenile courts.

NEB. REV. STAT. § 29-2204 (Cum. Supp. 1974).

64. NEB. REV. STAT. § 43-201 *et seq.* (Reissue 1974).

must possess and use the discretion given them in these two statutes.

Section 43-201 was amended to establish the procedure for instituting juvenile court proceedings.[65] It replaced the classes of juveniles covered by the old statute with those specified in section 43-202. In addition, it allows a city or village attorney to file a petition in juvenile court when proceeding against any juvenile under eighteen who has allegedly violated a city or village ordinance that would amount to a misdemeanor. Since the number of such ordinances is relatively small in most Nebraska municipalities, the effect of this on juvenile court proceedings is questionable.

The final significant change made by L.B. 620 was to grant the juvenile the right to appeal a decision of a juvenile court or a county court sitting as a juvenile court, to the district court.[66] If the district court finds the juvenile to be a child as defined in sec-

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65. The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a child in the county who appears to be a child as described in subdivision (1), (2), (3), or (4) of section 43-202 may file with the clerk of the court having jurisdiction in the matter, a petition in writing, setting forth the facts verified by affidavit. It shall be sufficient if the affidavit is upon information and belief. Such petition and all subsequent proceedings shall be entitled In the Interest of ————————, a Child Under Eighteen Years of Age, inserting the child's name in the blank.

When any child under eighteen years of age is alleged to have violated a city or village ordinance which if committed by a person over eighteen would amount to a misdemeanor, the city or village attorney may file a petition in the juvenile court having jurisdiction as provided in subdivision (3) of section 43-202.

NEB. REV. STAT. § 43-205 (Cum. Supp. 1974).

66. When a juvenile court proceeding has been instituted before a county court sitting as a juvenile court, the original jurisdiction of the county court shall continue until the final disposition thereof, and appeal may be had to the district court as in civil cases, but no such appeal shall stay the enforcement of any order entered in the county court. After appeal has been filed, the district court, upon application and hearing, may stay any order, judgment or decree on appeal if suitable arrangement is made for care and custody of the child. The county court shall continue to exercise supervision over the child until a hearing is had in the district court and the district court enters an order making other disposition. If the district court adjudges the child to be a child defined in section 43-201, the district court shall affirm the disposition made by the county court, unless it is shown by clear and convincing evidence that the disposition of the county court is not in the best interest of such child. Upon determination of the appeal, the district court shall remand the case to the county court for further proceedings consistent with the determination of the district court.

NEB. REV. STAT § 43-202.3 (Cum. Supp. 1974).

tion 43-202, it shall affirm the disposition made by the county court unless it is shown by "clear and convincing evidence" that the disposition is not in the best interest of the juvenile. If the latter is found, the district court will remand the case to the juvenile or county court for further proceedings.

The remaining ten sections of L.B. 620 merely amend the terminology of various pre-existing statutes.[67] Most of these amendments simply substitute the new classifications of juveniles for the old ones to make them consistent with the other provisions of the new law.[68]

V. CONCLUSION

L.B. 620, as a whole, is a progressive step toward providing justice and meaningful rehabilitation for the juvenile offender. This note has analyzed the legislative history and contents of this important legislation in an attempt to illustrate the relationship between each amended statute and its effect on various aspects of the juvenile court system. It is apparent that L.B. 620 has significantly reduced the prosecutor's discretionary power, and gives the court more flexibility in dealing with a broad category of juvenile offenders in an individualized manner.

The law's future effectiveness lies in the courts' interpretive hands. Its efficacy will rise or fall on their interpretations. One may be confident that this legislation will encounter opposition. The limitations it places on the prosecutors' discretion may prompt them to attack it. The law may also be attacked on constitutional grounds because of some procedural and substantive questions it raises. These problems may seek solutions in the court room or on the floor of the legislature.[69] However, no matter how changes

67. These sections amend individual state statutes as follows: Section 10 amends NEB. REV. STAT. § 43-206 (Supp. 1972); section 11 amends NEB. REV. STAT. § 43-206.02 (Reissue 1974); section 12 amends NEB. REV. STAT. § 43-206.03 (Supp. 1972); section 13 amends NEB. REV. STAT. § 43-208 (Supp. 1972); section 14 amends NEB. REV. STAT. § 43-209 (Reissue 1974); section 15 amends NEB. REV. STAT. § 43-210 (Supp. 1973); section 16 amends NEB. REV. STAT. § 43-210.01 (Supp. 1973); section 17 amends NEB. REV. STAT. § 43-215 (Reissue 1974); and section 18 amends NEB. REV. STAT. § 43-218 (Reissue 1974).

68. *See* sections 3 and 4 of L.B. 620.

69. Four bills pertaining to the disposition of cases involving juvenile offenders have been introduced that will significantly effect a number of the provisions of L.B. 620. The first of these is L.B. 288. At the present time it has not been passed. It would have eliminated the implementation of the rules of evidence at all hearings held to decide the question of waiver of jurisdiction to either the juvenile or

county court from the district court and would have added another criterion to the eight listed in section 4 of L.B. 620. This ninth criterion would allow the county attorney to consider "such other matters as he deems relevant" in making his decision as to the forum in which to prosecute the juvenile.

A second bill, L.B. 292, has been passed. It establishes a procedure by which a detained juvenile offender will have the right to a "probable cause" hearing concerning the continuation of his detention. The rules of evidence, however, will not apply to this proceeding. There is no mention of what standards or criteria the county attorney will have to follow in establishing "probable cause" to continue the juvenile's detention.

The third bill, L.B. 293, codifies due process safeguards at the hearing after the juvenile is in custody. The judge will be required to advise the juvenile—whether he is represented by counsel or not—that he has (1) the right to counsel; (2) the privilege against self-incrimination; (3) the right to confront anyone who has accused him and to cross-examine any witnesses who appear against him; and (4) the right to call witnesses in his own behalf. After these rights are explained, the court will then be able to accept an in-court admission by the juvenile (*i.e.*, a plea of guilty) of all or part of the allegations made against him in the county attorney's petition or charge. However, before accepting an admission the court is required to determine whether it is being voluntarily and understandingly made. L.B. 293 will greatly aid the protection of the juvenile offender's rights to due process of law.

Finally, L.B. 293—involving custodial detention of juvenile offenders—allows city or county authorities to place a juvenile in a state institution so that he or she can be examined by a physician, surgeon, psychiatrist or psychologist to determine the juvenile's mental condition, competence to participate in the proceedings, or legal responsibility for his acts. Placement in an adult penal institution is prohibited. The maximum amount of time the juvenile can be committed is sixty days. All costs incurred during this period will be absorbed by the state. Finally, the juvenile has the right to request a hearing to file a motion for release. L.B. 294 could be a "double-edged sword." On one hand, it could be used as an effective tool to aid the juvenile, and ensure a just adjudication. On the other hand, it could also be used to harass, degrade and intimidate the youth. This bill would, however, broaden the scope of facilities that could be used in disposing of juvenile cases in a manner consistent with the best interests of both the juvenile and society.

These bills could help to eliminate some of the problems inherent within L.B. 620. However, the language used in at least two of these bills could—if strictly interpreted—result in the deprivation of certain rights that are extremely important to anyone charged with a criminal offense. For example, L.B. 292 and L.B. 288 state that the rules of evidence "shall" not be used in hearings to determine whether the juvenile must remain in the custody of authorities after the court has entered an order continuing detention and in hearings to decide on the question of whether to transfer a case from district to juvenile court. Both types of hearings are extremely important to the juvenile offender. He or she—like any other defendant—should have the protection of the rules of evidence at these proceedings. It is not

made by L.B. 620 are interpreted in the future, the basic groundwork has been laid. It is now up to our judicial system to take hold of this tool and use it to mold a more rational and just system to prosecute the juvenile offender.

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difficult to envision the damage that could be done by the admission of blatantly hearsay testimony.

These laws will greatly affect the implementation and interpretation of L.B. 620. Therefore, their provisions should be studied closely to determine their precise effect on the disposition of cases involving juvenile offenders.